TEO SIEW PENG & 4 ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Tan Chiaw Thong J.), June 13 & 22, 1984]
[Kuching – Criminal Appeal No. KG. 7 of 1983]

Criminal Law & Procedure – Gang robbery – Young and first offenders – Principles of sentencing – Interference by appellate court – Penal Code, s.395 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173A, 293(i), 294, 294A, & 295 (i).

In this case, the 5 appellants were young and first offenders. They pleaded guilty in the Sessions Court and were convicted of the offence of gang robbery punishable under s.395 of the Penal Code. The Sessions Court, having called for probation reports, sentenced the 1st, 2nd, 4th, and 5th appellants to one year's imprisonment and 2 to 3 strokes of the rattan, and the 3rd appellant to one year's detention in the Sarawak Boys' Home and two strokes of the rattan. The appellants appealed against sentence. Their three common grounds were (1) there was no evidence to support the observation of the lower court that the offence was planned, (2) the lower court had given insufficient consideration to the probation reports on the appellants, and (3) the sentence in respect of each appellant was manifestly excessive having regard to the facts of the case and the antecedants and character of each of the appellants. The basic issue in the appeal was whether the learned President of the Sessions Court had erred in the principle of sentencing and whether the High Court should interfere in the sentence.

Held, varying the sentence: (1) in ordering the 3rd appellant, a youthful offender, to be detained in Sarawak Boys' Home for a period of one year, the learned President would appear to have dealt with him under the provisions of s.293(i), Criminal Procedure Code, as amended by P.U. (A) 97/76. If the President had intended to resort to both s.395 of the Penal Code and s.293(i) of the Criminal Procedure Code, for sentencing the 3rd appellant, the lower court was debarred by that section from imposing a sentence of whipping under s.395, Penal Code. The sentence of whipping here has no basis in law and must be set aside;

(2) in observing that the whole matter was planned, the President was not acting on the facts admitted by the appellants. He had placed more emphasis on the deterrent factor than on the reformative factor;

(3) an appellate court does not alter the sentence of a lower court unless it has erred in principle or that the sentence is manifestly excessive. In the particular circumstances, for the reasons that the reformative factors involved in sentencing and the probation reports and character and antecedents of the appellants do not appear to have been adequately considered, the lower court had erred in principle and therefore the appellate court should interfere in the sentence. There is no conflict between the public interest and that of the young offenders and the public have no greater interest than that they should become good citizens;

(4) each of the appellants was a fit case for probation. Sentence on the 1st, 2nd, 4th and 5th appellants was set aside and in substitution an order be made under s.294 of the Criminal Procedure Code that each appellant be released on his entering into a bond with two sureties, and during the period of 3 years to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour. During the period of the bond, each appellant should remain under the supervision of the Senior Probation Officer or the Probation Officer, Kuching. In respect of the 3rd appellant s.294, Criminal Procedure Code, does not debar the court from invoking it if the appellant at the time of the appeal has ceased to be a youthful offender. Accordingly, the same order was made in respect of the 3rd appellant. In respect of each of the appellants, there shall be two sureties in the sum of $3,000 each. The 1st, 2nd, and 3rd appellants shall each have his mother as one of the sureties. The 4th and 5th appellants shall have their respective parents as sureties;

(5) gang robbery is a very serious offence and generally would merit the harshest of punishment if an offender is convicted, and this case cannot by any means be regarded as a precedent.

Cases referred to:

(1) *Tiong Chi Seng & Anor* v. *Public Prosecutor* [1973] 2 M.L.J. 106, 107.
(2) *R.* v. *Ball* (1951) 35 Cr. App. R. 164.
(3) *Lim Yoon Fah* v. *Public Prosecutor* [1971] 1 M.L.J. 37.
(4) *Ho Kin Luan & Anor* v. *Public Prosecutor* [1959] M.L.J. 159.
(5) *Tukiran bin Taib* v. *Public Prosecutor* [1955] M.L.J. 24.
(6) *R.* v. *Smith* [1964] Crim. L.R. 70.

CRIMINAL APPEAL.

Michael Tan for the 1st & 2nd appellants.

Chan Kay Poh for the 3rd appellant.

C.K. Goh for the 4th & 5th appellants.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J. : In the lower court, the five appellants were convicted on their own respective pleas of guilty, of the offence of gang robbery punishable under section 395 of the Penal Code. The lower court, having called for probation reports on the appellants sentenced them as follows: The 1st appellant, to one year's imprisonment with 3 strokes of the rattan; the 2nd appellant, to one year's imprisonment and 2 strokes of the rottan; the 3rd appellant, to one year's detention in the Sarawak Boys' Home and 2 strokes of the rattan; the 4th appellant, to one year's imprisonment and 2 strokes of the rattan; and the 5th appellant, to one year's imprisonment and two strokes of the rattan.

The appellants have appealed to this court against sentence on various grounds. Common to the petitions of appeal of the appellants are three grounds, namely, that there was no evidence to support the observation of the lower court that the offence was planned; that the lower court had given insufficient consideration to the probation reports on the appellants; and that the sentence in respect of each appellant is manifestly excessive having regard to the facts of the case and the antecedents and character of each of the appellants.

The 3rd appellant, who was a youthful offender at the time of conviction, in his petition of appeal has advanced as one of the grounds, that in sentencing him to detention in the Sarawak Boys' Home and imposing two strokes of the rottan on him, the learned president had erred in law because the circumstances show that the lower court had acted under section 293(i) of the Criminal Procedure Code which provides for the sentences therein in the alternative and that therefore, by imposing cumulative sentences as mentioned, the lower court had erred in law. On the other hand, the learned Deputy Public Prosecutor contended that the offence of which the 3rd appellant was convicted, is a Penal Code offence and the penalty is prescribed therein, whereas the Criminal Procedure Code only deals with matters of procedure. In this connection, section 193(i), Criminal Procedure Code, empowers a criminal court, instead of awarding any term of imprisonment in default of payment of fine or passing a sentence of imprisonment upon a youthful offender, to deal with such convicted offender in the manner prescribed therein. If the convicting court had acted under this section, there would have been no doubt, in my opinion, that only one type of sentence prescribed thereunder may be imposed, as the sentences are specified in the alternative. That is clear by the use of the word "or" and in my view, in the context in which this word "or" is used, it could not be so construed as to mean "and". However, the question to consider is whether the lower court in imposing sentence upon the 3rd appellant had acted under this section or not. There is no mention in the sentence of the lower court that it had acted under this section, and it is a matter for consideration whether the record of proceedings of the lower court indicates that it is a necessary implication that the learned president had acted under this section.

From his sentence, in ordering the 3rd appellant to be detained in the Sarawak Boys' Home for a period of one year, the learned president would appear to have dealt with the 3rd appellant under the provisions of section 293(i)(d) as amended by P.I.(A)97/76. If the learned president had sentenced the 3rd appellant without resorting to this section he must necessarily have dealt with him in the same manner as the other appellants, because it is only this section that empowers him to commit the 3rd appellant, a youthful offender, to the Boys' Home. There is of course power given to the learned president not to commit the 3rd appellant to the Boys' Home in which event, if he had considered that imprisonment was not a fit and proper penalty, he would, apart from section 293(i), Criminal Procedure Code, have had to resort to the provisions of section 173A of the Criminal Procedure Code, but this was expressly excluded by the learned president in his sentence. Barring recourse to section 173A or section 293(i), Criminal Procedure Code, it seems clear that the sentence would have had to be one of imprisonment, but that is not the sentence imposed by the lower court. Hence, in sentencing the 3rd appellant, the lower court would appear to have acted under section 293(i)(d), Criminal Procedure Code, as amended.

The power of imposing whipping upon a youthful offender is conferred upon the lower court by section 395 of the Penal Code. In this connection, section 288(iv) of the Criminal Procedure Code provides for the mode of executing such a sentence. This sub-section stipulates that in the case of a youthful offender, whipping shall be inflicted in the way of school discipline with a light rattan. It is clear from the sentence of the lower court that this sentence of whipping was not imposed upon the 3rd appellant following a sentence of imprisonment imposed under section 395 of the Penal Code. In this connection, if the lower court had intended to resort to both section 395, Penal Code and section 293(i), Criminal Procedure Code, for sentencing the 3rd appellant, then, in my opinion, by resorting to section 293(i), Criminal Procedure Code, it is debarred by that section from imposing a sentence of whipping under section 395, Penal Code, since the latter section provides for sentencing in one of the alternative ways thereunder, which in my view excludes a sentence of whipping under the former section, particularly since section 293(i), Criminal Procedure Code comes into operation as an alternative only when a convicting criminal court considers that a sentence of imprisonment should not be imposed upon a youthful offender. On the other hand, if

the sentence of whipping was imposed under section 293(i)(c), Criminal Procedure Code, then, in my opinion, for the reasons given, it is not sanctioned by section 293(i), Criminal Procedure Code since alternative, and not cumulative, sentences are prescribed thereby. Hence, I am of the view that the contention of learned counsel for the 3rd appellant that the sentence of whipping here has no basis in law, is sound. This sentence is therefore set aside.

As stated earlier on, there are certain grounds of appeal which are common to all the petitions of appeal. I consider the other grounds to be without substance. I shall deal with the grounds which merit consideration.

The first ground is a complaint that there was no evidence on which the learned president could base his observation that the offence was well-planned. The brief facts of the case as given in Exh. P1 in the lower court do not appear to show that the five appellants met the victim and his two friends as a result of a pre-arrangement, or that the victim and his friends were induced or led to the place where the offence was committed. Rather, the facts would appear to indicate that it is not an impossibility that it was a chance meeting. I am not saying that the facts show that it was a chance meeting, but that possibility does not appear to be excluded by the admitted facts, so that it would seem that in observing that the whole matter was planned the learned president was not acting on the facts admitted by the appellants.

The other common ground is the complaint that insufficient consideration had been given by the lower court to the probation reports on the appellants. In his sentence, the learned president at page C thereof stated in the second paragraph that he had also read and considered carefully the detailed probation reports on the accused made by the Senior Probation Officer, Mr. Wang. That is all that was said about the probation reports. The learned president did not state why, having regard to the probation reports which are all favourable to the appellants, he considered that the recommendations therein are unsuitable in respect of each of the appellants. The learned president in his sentence emphasised that the public interest must be taken into account, and he rightly stated that the criminal law is enforced not only to punish the persons concerned but to prevent crimes. He also went on to say that the court must consider the interest of the accused as well as the victim or victims concerned. It is clear from the sentence of the lower court that emphasis was placed more on the deterrent factor than on the reformative factor concerned in the consideration of the imposition of sentence.

Now, it is clear that the objects of sentence are three-fold, namely, in order to prevent any recurrence of an offence the offender must be dealt with by taking from him the power of offending *i.e.* incapacitation; secondly, by taking away the desire of offending (reformation); and thirdly, by making him afraid of offending (intimidation). (See *Tiong Chi Seng & Anor.* v. *Public Prosecutor*[1]). There is no doubt whatsoever that the offence of which the appellants were convicted is a very serious one. However, it is also established that in dealing with the individual offender the circumstances of the offence and the character and antecedents of the offender should also be taken into account. Apart from briefly mentioning that the interest of the accused should be taken into account in the sentence, the lower court does not appear, in my view, to have dealt fully with the character and antecedents of the appellants and, as earlier stated, with the reformative factor involved in sentencing.

Now, it is clear that in the probation reports in respect of each appellant in the lower court, although the Senior Probation Officer did not expressly recommend probation, his reference to the readiness of the Probation Service to assist in whatever way the court might direct, implied that if probation was ordered in respect of each appellant, the Probation Service was prepared to supervise the appellants. The lower court, apart from mentioning that careful consideration had been given to the probation reports, came to the conclusion that a custodial sentence was the only proper one in the particular circumstances in respect of each of the appellants. As earlier stated, although on the one hand it is right and correct that the deterrent factor must be taken into account, on the other hand, in respect of each individual offender, particularly in the case of young offenders, the reformative factor should also be adequately considered. In this respect, I do not consider that the lower court, having regard to the record of proceedings, had adequately considered the reformative factor involved in sentencing.

It is undisputed that the five appellants are young offenders, the 3rd offender being the only

youthful offender at the time of the commission of the offence. The oft-quoted judgment in the case of *R.* v. *Ball*[2] contains the following passage:

"The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case."

Then the judgment went on:

"It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. ..... The background, antecedents and character of the one (offender) and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career."

The second aspect of deterrence is borne out by the case, which has been quoted in the course of argument, of *Lim Yoon Fah* v. *Public Prosecutor*[3] where the appellant was aged 20 years and 7 months at the time of commission of the offence. In the course of his judgment on appeal, Chang Min Tat, J. (as he then was) held that in that case the public interest would be best served by helping the offender to turn from criminal ways to honest living and as there was a probability that the appellant would turn over a new leaf, if given a chance, the appellant would be put on bond under section 294 of the Criminal Procedure Code for 3 years, in the sum of $1,000 in one surety. The learned judge in his judgment quoted from the case of *Ho Kin Luan & Anor.* v. *Public Prosecutor*[4] which contains the following passage: "Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender". The learned judge also stated that it was by reason of the character and antecedents of the offender and in the particular circumstances of that case that he proposed to allow that appeal, as he felt from reading the probation report and after hearing the counsel of the appellant and receiving an assurance from the parents of the appellant, that the appellant would in all probability turn over a new leaf.

In the case of all the appellants here, a perusal of the probation reports presented both in the lower court and to this court, show that they come from quite decent families, some of which are large, including children, none of whom had any record of any misconduct or misbehaviour. At the time of the commission of the offence, most of the appellants were gainfully employed. In this court, it is disclosed in the probation report of the first appellant that he is remorseful and that he is gainfully employed in a construction firm. Further, that his employer speaks well of him. His mother is also prepared to be responsible for his future good conduct. In respect of the 2nd appellant, his probation report also shows that he is remorseful and has promised never again to fall afoul of the law, and that he is now gainfully employed in a firm jointly owned by his uncle and his brother; and that members of his family are willing to be responsible for his future good conduct. He is married with a child. In respect of the 3rd appellant who at the time of the commission of the offence was a youthful offender, his probation report shows that his uncle has made efforts to keep him out of trouble by giving him work and that he is presently assisting his mother at her dress-making shop and learning to become a tailor; and also that his mother is prepared to be responsible for his future good conduct. In respect of the 4th appellant, his probation report states that he has always been a reasonable lad and his behaviour at home has given his parents no cause for anxiety. He is also remorseful and his father is prepared to be responsible for his future good conduct. He is also gainfully employed as a construction worker with his father who is a sub-contractor. In respect of the 5th appellant, his probation report states that he has always been trustworthy and his behaviour has given his parents no cause for alarm until the present offence. He is working regularly as an assistant electrician with his uncle. His father is prepared to be responsible for his future good conduct.

As stated, at the time of the commission of the offence, all the appellants were young offenders, none of whom was above the age of 19 years. They are also first offenders. I take note of what was stated in the judgment in *Tukiran bin Taib* v. *Public Prosecutor*[5] that "it is very desirable that a young first offender who is between the ages of 17 and 21 should be kept out of prison, if possible." In that case, it is true that instead of imprisonment the appellant was sentenced to an advanced approved school, but the emphasis is that in respect of young offenders, imprisonment should be

avoided as far as possible. In this connection, I would also quote for the purpose of consideration a passage in The English Sentencing System by *Cross* (3rd Edition) at page 141 which, after reference to the English Advisory Council on the Penal System, quoted from paragraph 10 of "The length of Prison Sentence" as follows:

"Prolonged and repeated imprisonment is destructive of family relationships and, by encouraging the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society. In addition, long-term institutionalisation is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society."

In the Principles of Sentencing by *Thomas* (1st Edition), quoting from the judgment in the case of *R.* v. *Smith*[6] that publication at page 19 thereof states:

"In the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen. The difficult task of the Court is to determine what treatment gives the best chance of realizing that object. That realization is the first and by far the most important consideration."

Now, in respect of each of the appellants here, there is a favourable probation report. The Probation Service is ready to undertake their supervision if the appellants are placed on probation. The matter for consideration is whether, in order to give the best chance of realizing the object of turning the appellants into good citizens, they should be sent to prison or given another chance to turn over a new leaf, behave themselves and keep out of trouble having regard, as earlier observed, to the fact that all of them were young offenders at the time of the commission of the offence. The *Smith* case laid emphasis that the public have no greater interest than that young offenders should become good citizens. Having regard to the circumstances of the offence, the character and antecedents of each of the appellants and the probation reports, I am of the opinion that the object of turning the appellants into good citizens could be better achieved by not sending them to prison and imposing whipping at the same time. It is noted that each of them had been in custody for over 80 days. This no doubt, having regard to the evidence before this court, would have had a salutary effect on each of the appellants.

The learned president had observed that the offence was committed rather blatantly in a public place and that the victim had been punched in the process and some money was taken from him. I have also observed that the facts do not appear to exclude the possibility that the meeting of the two groups might be a chance meeting, which means that the facts before the lower court, although showing that the offence was committed in a public place, do not appear to exclude the possibility that the offence was committed without premeditation, and that the punching was only done by one of the 5 appellants. The facts also indicate that after the arrest the appellants admitted the offence to the police.

I have come to the conclusion, for the reasons given, and bearing in mind that an appellate court does not alter the sentence of a lower court unless it had erred in principle or that the sentence is manifestly excessive, that in the particular circumstances, for the reasons that the reformative factor involved in sentencing and the probation reports and character and antecedents of the appellants do not appear to have been adequately considered, the lower court had erred in principle and therefore this court should interfere in the sentences. I further consider that, particularly bearing in mind the quotation to which reference has been made in the case of *R.* v. *Smith*, there is no conflict between the public interest and that of the young offenders and that the public have no greater interest than that they should become good citizens.

I consider that in the particular circumstances, the sentences of the appellants should be altered. I consider that in respect of each of them, it is a fit case to order probation. I therefore set aside the sentence imposed on each of the 1st, 2nd, 4th and 5th appellants and substitute therefore an order under section 294 of the Criminal Procedure Code that in respect of each appellant, he be released on his entering into a bond with two sureties, and during a period of 3 years to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour. Pursuant to section 294A of the Criminal Procedure Code, it shall be a condition of the bond that in respect of each of the four appellants, during the period of the bond, he shall remain under the supervision of the Senior Probation Officer or the Probation Officer, Kuching, and during such probation period he shall obey and carry out the reasonable instructions of the Senior Probation Office or the Probation Officer, Kuching, as may be given to him from time to time.

In respect of the 3rd appellant, he has been sentenced to the Boys' Home for a period of one year. His probation report before this court shows that his family relationship is good and that he is learning to become a tailor with his mother who is the proprietress of a dress-making shop, and that he is being paid pocket money of between $80/- and $100/- a month. He has ceased to be a youthful offender. The question is consider is whether section 294 applies to him. It has been argued on the one hand that that section does apply to the 3rd offender because he has ceased to be a youthful offender. The question to consider is whether the time for determining whether the 3rd appellant is a youthful offender is at the time of the commission of the offence. It is to be noted that under the provisions of section 293(i) of the Criminal Procedure Code the words "is convicted" are couched in the present tense, whereas the words "has been convicted" under section 294(i) are couched in the past perfect tense. I am inclined to the view that, because of the different wording in the two sections, and having regard to the power conferred upon this court in appropriate cases to alter the nature of the sentence of the appellant, section 294 does not debar this court from invoking it if the appellant at the time of the appeal has ceased to be a youthful offender. Accordingly, I would make the same order in respect of the 3rd appellant that is, that his sentence is set aside and that in lieu thereof he is placed on probation for a period of 3 years on his entering into a bond to appear and receive judgment if and when called upon, and in the meantime to be of good behaviour, and that it shall be a condition of the bond that he shall, during his probation period, be placed under the supervision of the Senior Probation Officer, or the Probation Officer, Kuching, and obey the reasonable instructions of the Senior Probation Officer or the Probation Officer, Kuching, as may be given to him from time to time.

In respect of each of the appellants, there shall be two sureties in the sum of $3,000/- each. As regards the 1st appellant, one of the sureties shall be the mother; in respect of the 2nd appellant, one of the sureties shall be the mother; in respect of the 3rd appellant, one of the sureties shall be the mother; and in respect of the 4th and 5th appellants, the sureties shall be the parents in each case.

Before I leave this case, I would emphasize that the course I am taking may be considered to be exceptional, having regard to the character and antecedents and the public interest involved, including the factor that the appellants are young offenders and that generally they should be kept out of prison. I need hardly emphasise that gang robbery is a very serious offence and generally would merit the harshest of punishments if an offender is convicted, and this case cannot by any means be regarded as a precedent. The appellants are impressed upon that the effect of the order I make in respect of each of them is to give them an opportunity to turn over a new leaf and to be good citizens and that, if during the period of their probation, *i.e.* 3 years, they should breach any condition of their bond, they will be brought before the court and sentenced for the original offence of which they have been convicted.

Order accordingly.

Solicitors: *Ibrahim & Co.; Chan & Chan; Chan, Jugah, Wan Ullok & Co.*

KOK WEE KIAT v. CHONG HON NYAN WONG CHWEE LAI v. CHONG HON NYAN CHOO CHONG HEE v. CHONG HON NYAN CHAN SIANG SUN v. MALAYSIAN CHINESE ASSOCIATION.

[O.C.J. (Wan Hamzah J.) July 20, 1984]
[Kuala Lumpur – Suit Nos. A3, A4, A5 & A6 of 1984]

Societies – Political party – Suspension of its branches – Whether valid – Expulsion of members – Whether valid – Fictitious members – Validity of extraordinary meeting – Serious questions to be tried – Whether injunctions should be granted.

In these four civil suits, the plaintiffs, members of the Malaysian Chinese Associations (MCA), sued the MCA in the name of its Secretary-General Chong Hon Nyan. The plaintiffs applied by summonses-in-chambers mainly for interlocutory injunctions to restrain the MCA from holding certain divisional assemblies for the purposes of electing delegates to its General Assembly. The suits arose out of the suspensions of the relevant branches of the MCA affecting the rights of the plaintiffs. The applications were consolidated and heard together. The crux of the contentions for all the plaintiffs was that their respective branches were wrongfully suspended by the MCA and that the suspension was in contravention of its constitution. In the case of the plaintiff (Wong) in Suit A4/1984 he also claimed that he was wrongfully expelled from MCA. The plaintiff in Suit A6/1984 raised the issue of fictitious members on the register of the MCA and the resolution passed on May 6, 1984 at the adjourned extraordinary meeting of the General Assembly convened by request of 1,499 delegates.